was not to allow his relatives to interfere with the rights of access of the plaintiff -

1. For the school holidays during the puasa period and the Hari Raya celebration and the next school vacation, 28 May 1993 to 16 September 1993, the mother shall have access to the child every Friday, Sunday and Tuesday from 9 a.m. to 7.30 p.m. at her husband's home;

2. When school is not on vacation for 1993 the mother shall have access to the child every Friday from 9 a.m. to 7.30 p.m. at her husband's home;

3. At the next school vacation in August 1993, 20 August 1993 to 28 August 1993, and other school vacations in 1993 and 1994 and thereafter the mother shall have access to the child every Friday, Sunday and Tuesday from 9 a.m. to 7.30 p.m. at her husband's home but on Fridays the mother may take out the child provided the mother is accompanied by an adult of the mother's choice;

4. When school is not on vacation for 1994 and thereafter the mother shall have access to the child every Friday from 9 a.m. to 7.30 p.m. and she may bring the child out for the same time period provided she is accompanied by an adult of her (mother's) choice. There shall be liberty to apply.

SOO SHIOK LIONG

v.

PENDAKWA RAYA

HIGH COURT, PENANG
TUAN VINCENT NG KIM KHOAY JC
[CRIMINAL APPLICATION NO. 44-16-93]
12 APRIL 1993

CRIMINAL LAW AND PROCEDURE: Charge under s.108 Penal Code - Trial Court allowing bail - Application for reduction of bail amount - Principles applicable - Preparation of affidavits by Counsel - Inclusion of statements found to be untrue - Duty of Counsel to Court.

The applicant was charged with abetting in the commission of 13 offences of criminal breach of trust. The trial Court granted bail bond in two sureties in the sum of RM1,000,000 conditional upon his surrender to the Court of all his travel documents.

The applicant applied by way of notice of motion for the reduction of the amount of bail bond. The applicant obtained an early hearing date by the use of a certificate of urgency on the grounds that he was not in good health. There was in fact no evidence of ill health. The applicant filed an affidavit in support of the notice of motion which was subsequently found to contain untrue statements.

[Ed. Note: The following paras of the headnote were provided by His Lordship Vincent Ng Kim Khoay JC**].**

Held:

[1] Quite correctly, the Court below did not impound the applicant's International Passport. This, the Court is not empowered to do under s. 388 of the Criminal Procedure Code, though it may set certain conditions to granting of bail.

[2] Considering that it has now become a common practice for Counsel to file certificates of urgency in criminal as well as civil cases without sufficient justification, courts would have to be concerned to ensure the authenticity of such claims of urgency by Counsel.

[3] This court is of the view that while there is no obligation placed on Counsel, when preparing affidavits, to verify the truth of statements affirmed by their clients in their affidavits, it is nevertheless the duty of Counsel, as

officers of the court, to desist from being a party to the inclusion in such affidavits, statements that they ought to, or are in the position to know to be untrue. Such conduct by Counsel would be dishonest and unbefitting within the meaning of the strictures contained in s. 93(2)(b) of the Legal Profession Act 1976.

[4] In granting or refusing bail the Court has quite clearly to apply its mind with the greatest care to certain matters for consideration, and the Courts have always leaned in favour of admitting an accused person to bail.

[5] The learned Judge of the Sessions Court gave no indication that in setting the quantum of bail he had applied his mind to the primary consideration in deciding this issue, being the securing of the attendance of the applicant. He had thus failed to show that he had exercised his discretion judicially. In particular, he has to decide, having due regard to the circumstances of the case that the amount imposed would not be excessive but be sufficient to secure the attendance of the applicant.

[6] This application of mind by the learned Judge when fixing quantum of bail bond is required under s. 389 of the Criminal Procedure Code in exercise of his discretion pursuant to s. 388(1) of the Code, in as much as such application of mind is similarly required in his exercise of the discretion itself, under s. 388(1) of the Code.

[7] Factors for consideration in setting the quantum of bail bond - application of the Court's mind in considering such factors to be reflected in the judge's records.

[Quantum of bail reduced to RM600,000 in two sureties conditional upon surrender of applicants passport to trial Court].

Cases referred to:
Lim Kiap Khee v. PP [1988] 1 MLJ 198 / [1987] 2 CLJ 442 ***(refd)***
PP v. Dato Mat @ Mat Shah bin Safuan @ Ahmad [1991] 2 CLJ 1112 ***(refd)***
Goh Bew Yam v. Reg [1956] 22 MLJ 251 ***(refd)***
PP v. Wee Swee Siang [1948] 14 MLJ 114 ***(refd)***
Che Su bte Daud v. PP [1978] 2 MLJ 162 ***(refd)***
Chinnakarappan v. PP [1962] 28 MLJ 234 ***(refd)***
Zulkifflee bin Haji Hassan v. PP [1987] 2 MLJ 527 ***(refd)***
Reg v. Rose [1898] 18 Cox C.C. 717; [1895-9] All ER Rep. 350 ***(refd)***
Low Chit Bah v. PP [1986] 1 MLJ 297 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 388(1), 389
Legal Profession Act 1976, s. 93(2)(b)
Penal Code, ss. 108, 409, 411

For the applicant - M/s. C.P. Ang & Co.
For the public prosecutor - Salim Soib, DPP

JUDGMENT

Vincent Ng Kim Khoay JC:
This is an application by Notice of Motion for a reduction of the amount of RM1,000,000 in two sureties, which was imposed by the Sessions Court, Butterworth in respect of arrest case No. 62-(45-69) - 93. The application is supported by the affidavits of the applicant (enclosure 3 and 5) and a certificate of urgency (Encl. 4) by his Counsel Mr Ang Chun Pun. The Public Prosecutor filed an affidavit-in-reply affirmed by the Acting Deputy Superintendent of Police (Encl. 6) who was the Investigating Officer of the said arrest case.

The applicant and another was charged in the Sessions Court on 13 March 1993 with 13 charges under s. 108 of the Penal Code for abetting 13 offences of criminal breach of trust under s. 409 of the Penal Code allegedly committed by one Baharudin Shah bin Che' Sat . The 13 charges being for non-bailable offences in respect of an aggregate sum of RM5,000,000 more or less.

The question of bail was considered after the plea was recorded. According to the copy of the record of proceedings obtained by my Senior Assistant Registrar, the DPP Encik Zainal Adzam told the Court below that he had no objection to bail being granted to the applicant and had suggested the bail bond be set at RM1,000,000 in two sureties, conditional upon his surrender to the Court, of all travel documents of the applicant, presumably including the International Passport of the applicant.

Mr C.P. Ang then asked the Court to reduce the amount of bail suggested by Encik Zainal on the grounds that:

(a) the applicant had co-operated with and surrendered himself to the police.
(b) RM1,000,000 is excessive and the Accused cannot raise that bail.
(c) the Accused would thus be unable to better prepare his case which involved a lot of documentary evidence.

(d) He suggested that bail of RM200,000 would be sufficient to secure the Accused's presence as his International Passport had already been impounded by the police.

The learned Sessions Court Judge accepted the learned DPP's suggestion and set bail at RM1,000,000 in two sureties. He also ordered that the International Passport of the applicant be surrendered to the Court as a condition of granting bail. Quite correctly, the Court did not impound the applicant's International Passport. This, the Court is not empowered to do under s. 388 of the Code, though it may set certain conditions to granting of bail. See *Lim Kiap Khee v. PP* [1988] 1 MLJ 198 and *PP v. Dato Mat @ Mat Shah bin Safuan @ Ahmad* [1991] 2 CLJ 1112.

Before I deal with the question in issue it may not be amiss for me to consider two side issues which may be pertinent to legal practitioners and which concerns the applicant's Counsel.

The application was heard upon a certificate of urgency (Encl. 4) signed by the applicant's Counsel. One of the two grounds of urgency stated by him was that his client's health was not good and any delay in his release would further affect his health. The other being the fact of his detention. I note with regret that there is no mention of the state of the applicant's health even by the applicant himself in his supporting affidavit (Encl. 3), though he did make a feeble attempt *ex-post facto* in his subsequent affidavit to mention something about his health being affected by his treatment while in detention.

As such, this Court wishes to express it s concern that, from the records as it stood down (when this application was originally fixed for hearing) it would appear that the facility afforded by the provision for prompt disposal of applications upon certificates of urgency, had been abused by Counsel here. Counsel's attention was also drawn to the Courts displeasure regarding this at the first hearing of this application on 23 March 1993. Considering that it has now become a common practice for Counsel to file certificates of urgency in criminal as well as civil cases without sufficient justification, courts would have to be concerned to ensure the authenticity of such claims of urgency by Counsel.

Encik Zainal had also submitted that in paragraph 9(d) of Encl. (5) the applicant had affirmed that he had never been charged for any offence involving dishonesty, cheating or breach of trust, whereas Exh. "ZRA1" of the affidavit of the Timbalan Penguasa Polis (Encl. 6) showed that the applicant had, even then, stood charged for an offence under s. 411 of the Penal Code for receiving stolen property (the said earlier charge). Thus, the learned Mr Deputy said, the applicant had lied and had shown that he had treated the Court with contempt; and Counsel Mr C.P. Ang may also have acted for the applicant in that case. If so, he must have known of the blatant lie his client told when he drafted Encl. 5 for his client. This Court is of the view that while there is no obligation placed on Counsel, when preparing affidavits, to verify the truth of statements affirmed by their clients in their affidavits, it is nevertheless the duty of Counsel, as officers of the Court, to desist from being a party to the inclusion in such affidavits, statements that they ought to, or are in a position to know to be untrue. Such conduct by Counsel would be dishonest and unbefitting within the meaning of the strictures contained in s. 93(2)(b) of the Legal Profession Act 1976.

In the event, the Court called for the records of the said earlier charge and was satisfied that M/s. Sajali, Ameir & Partners but not C.P. Ang had acted for the applicant in the earlier charge. Even then, the manner in which paragraph 9 (d) of Encl. (5) was expressed, left much to be desired in terms of credibility of the deponent.

I now turn to consider the merits of the application of the client, the applicant himself.

In all cases where the jurisdiction is of a discretionary nature, the High Court will be slow to interfere unless it appears that the learned Judge, in arriving at his decision had acted on some wrong principle. See *Goh Bew Yam v. Reg* [1956] 22 MLJ 251. In this case the records are devoid of any indication of the principles, if at all, that the learned Judge had adopted.

The matters for consideration in granting or refusing bail are as set out in Mallal's Criminal Procedure (4th Ed.) at page 551 and the cases of *PP v. Wee Swee Siang* [1948] 14 MLJ 114 and *Che Su bte Daud v. PP* [1978] 2 MLJ 162. In granting or refusing bail the Court has quite

clearly to apply its mind with the greatest care to all the aforesaid matters for consideration. See *Chinnakarappan v. PP* [1962] 28 MLJ 234. The Courts have always leaned in favour of admitting an accused person to bail. See *PP v. Dato Mat @ Mat Shah* (*ibid*).

The present application does not however concern the granting or refusal of bail, as from the record I gather that the learned DPP had, in the Court below, consented to the applicant being admitted to bail subject to conditions as aforesaid. Thus, the matter for judicial determination here only concerns the correctness of the quantum set for bail by the learned Judge of the Sessions Court.

No grounds or consideration appeared from the learned judge's records to justify the amount RM1,000,000 that he had fixed for bail. He gave no indication that in setting the quantum of bail he had applied his mind to the primary consideration in deciding this issue, being the securing of the attendance of the applicant. He had thus failed to show that he had exercised his discretion judicially. In particular, he has to decide, having due regard to the circumstances of the case that the amount imposed would not be excessive but be sufficient to secure the attendance of the applicant. See *Zulkifflee bin Haji Hassan v. PP* [1987] 2 MLJ 527 and *Reg v. Rose* [1988] 18 Cox CC 717; [1985-9] All ER Rep. 350. This application of mind by the learned judge when fixing quantum of bail bond is required under s. 389 of the Criminal Procedure Code ("the Code") in exercise of his discretion pursuant to s. 388(1) of the Code, in as much as such application of mind is similarly required in his exercise of the discretion itself, under s. 388(1) of the Code (*supra*).

For the above reasons the RM1,000,000 set by the learned judge would appear to be an arbitrary figure and contrary to the requirements under the provisions of s. 389 of the Code which states as follows:

> The amount of every bond executed under this chapter shall be fixed with due regard to the circumstances of the case as being sufficient to secure the attendance of the person arrested, but shall not be excessive; and a Judge may; in any case; whether there be an appeal or conviction or not, direct that any person be admitted to bail or that the bail required by a police officer or Court be reduced or increased.

The factors for consideration in setting the quantum of bail bond are as follows:

1) The nature and gravity of the offence and the severity and degree of punishment which conviction might entail. This is only one of the relevant, but not overriding, factors to be considered. It is thus decidedly wrong to fix the quantum of bail bond solely on the basis of such quantum being in proportion to the value of the subject matter of the charge, in as much as such reckoning would eclipse the overriding concern that bail bond should not be excessive but only be sufficient to secure the attendance of the Accused.
2) The quantum should be higher in the case of non-bailable offences.
3) An excessive quantum may defeat the granting of bail as the Accused may find difficulty in getting a bailor acceptable to the Court.
4) The principle and basis of our criminal law is that the Accused is presumed to be innocent until proven guilty.
5) Whether there is a likelihood of the applicant absconding if the bail quantum is set at too low. See *Low Chit Bah v. PP* [1986] 1 MLJ 297.
6) Bail is not intended to be punitive but only to secure the attendance of the Accused at the trial therefore that amount of the bond must be fixed with the regard to the circumstances and must not be excessive. See *Reg v. Rose* (*supra*). The amount of bail may vary according the circumstances even on similar value of the subject matter of the charge.
7) His surrender of his International Passport should go to reduce the quantum of bail. See *PP v. Dato Mat @ Mat Shah bin Safuan @ Ahmad* (*supra*).
8) The fact that the Accused had presented himself at the police station and had cooperated with the police should also go to abate the quantum of bail.
9) The quantum of bail should not be set so prohibitively high as to have the effect of incarcerating the Accused before he is convicted of the crime. See *Zulkifflee bin Haji Hassan v. PP* (*ibid*).
10) Application of the Court's mind in considering the above factors ought to be reflected in the judge's records.

The question for consideration in our instant case is whether bail of RM1 million in two sureties is adequate or too excessive in the light of the circumstances herein. Applying the principles adumberated above to the facts of this case, it appears to me that the bail of RM1 million has the unfortunate effect of punishing the applicant before he is proved guilty of the charges against him. This is evident from the fact that he is unable to find the two sureties to secure such bail. As a result he has been on remand in prison from 20 February 1993 to date. The amount of money fixed by the Court as bail is not the sole consideration to ensure the attendance of an Accused person in Court. A wealthy accused may be too happy to deposit a million dollars in court and then abscond from the country and does not attend the trial. On the other hand, a person of meagre means, who cannot raise bail of RM1 million may be kept in the remand prison for months before his trial and in the end he may be found not guilty.

In considering the amount of bail bond the Court below should have taken into consideration the circumstances peculiar to the case. The applicant has been co-operative with the police in their investigation. According to paragraph 4 encl. 5 and paragraph 9 Encl. 3, the applicant had voluntarily visited the Chief Police Officer at the Contingent Police headquarters, Penang (and was indeed arrested) on 20 February 1993 when called to do so.

The learned DPP had submitted in the Court below during the hearing of the bail bond application that the gross value of the subject matter of all the 13 charges was in the region of RM5,000,000. The applicant was also jointly charged with two others in respect of the same subject matter of loss of RM5,000,000 by a Finance Company through the criminal acts of the three of them. The quantum of the bail bond of the two other accused persons were, according to the record, also fixed at RM1 million each in two sureties which brings the grand total in respect of the three accused, charged on that day, to RM3 million on a RM5 million subject matter of the charge. If this method of reckoning was indeed employed by the learned Judge of the Sessions Court - that is, the quantum being set on the basis 3/5 or 60% of the value of the subject matter of the charge - then such basis, as the sole basis of fixing quantum of bail bond, would not only be impermissible but would be manifestly excessive.

The case of *Low Chit Bah v. PP* (*ibid*) is inapplicable here, as in that case there was affidavit evidence that the applicant, a Singapore citizen, had travelled on a forged Philippines passport and under an assumed name of John L. Santo; entering Singapore on three occasions.

Having weighed all the above considerations and having given them their proper weight, I am of the view that the quantum of bail in respect of the applicant should be reduced to RM600,000 in two sureties, conditional upon the surrender of the applicant's International Passport to the Court below.